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SUPREME COURT, STATE OF COLORADO

Case No. 93 SA 017

On Appeal from the District Court, City and County of Denver
H. Jeffrey Bayless, Judge; Case No. 92 CV 7223

OPENING BRIEF

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN,

Plaintiffs-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants-Appellants.

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SUPREME COURT, STATE OF COLORADO

Case No. 93 SA 017

On Appeal from the District Court, City and County of Denver
H. Jeffrey Bayless, Judge; Case No. 92 CV 7223

OPENING BRIEF

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN,

Plaintiffs-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants-Appellants.

INTRODUCTORY STATEMENT

Pursuant to C.A.R. 1(a)(3), the Defendants-Appellants ("Defendants") appeal the lower court's order preliminarily enjoining them from enforcing "Amendment 2," a new voter-initiated amendment to the state constitution.

As this Court is aware, this case involves some of the most difficult and divisive public policy issues of the day. The public is daily bombarded with news stories and editorials mirroring the different sentiments we hold concerning homosexual and bisexual lifestyles. Every day, we make choices regarding what we think about, and how we relate to, other Americans. As a State, and as a Nation, it is necessary to determine the boundaries between

permissible and impermissible forms of associational choices. It is absolutely clear that the vast majority of Coloradans who supported Amendment 2 did not do so out of hatred or malice towards homosexuals and bisexuals. Rather, they supported it because they did not want government to intervene and impose values on an unwilling segment of the public in this most controversial area of public debate.

On one level, this case is about how we view our fellow citizens. On a more fundamental one, however, it is about how we govern ourselves -- who gets to make the controversial choices.

In a fundamentally flawed order, the lower court nullified the will of the people of this State and undermined public confidence in the rule of law by finding that the amendment infringes upon a heretofore unknown constitutional "right." However, this new "right" -- which the lower court characterized as the right "not to have the State endorse or give effect to private biases" -- has no basis in law or sound public policy.

The central issue of this case is whether Amendment 2 infringes upon any federally-guaranteed fundamental rights, and if not, whether it is supported by an adequate rational basis. These are questions of law which are ripe for adjudication at this time; there is no impediment to, and indeed the public interest strongly warrants, a final resolution by this Court of any uncertainty surrounding the validity of Amendment 2.

STATEMENT OF THE CASE

In March 1992, the requisite number of qualified voters submitted to the Secretary of State a petition to place before the electorate a proposal to add a new section 30 to article II of the Colorado Constitution.[1] On November 3, 1992, the proposal, which was submitted to the voters as "Amendment 2," passed by a margin of 813,966 to 710,151 (53.4% to 46.6%).[2] Amendment 2 provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have any claim of minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

On November 12, 1992, the Plaintiffs-Appellees ("Plaintiffs") instituted an action to have Amendment 2 declared unconstitutional on its face, and to enjoin its enforcement. The Plaintiffs claimed that the amendment violated several provisions of the state and

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[1]The Revisor of Statutes and the Office of Legislative Legal Services have renumbered this provision as § 30b for "ease of location." Colorado Revised Statutes, "Voter Approved Changes" at 3 (Special Supp. 1992).

[2]The Secretary of State certified these totals on December 16, 1992 when, as required by law, she canvassed the results of the election. Colo. Const. art. V, § 1. Because these figures are undisputable and a matter of public record, this Court may take judicial notice of them. C.R.E. 201; In Re Interrogatory Propounded by the Governor, 814 P.2d 875, 880 (Colo. 1991).

federal constitutions (v. 1, pp. 1-15, 111-25).[3]

On December 23, 1992 and December 28, 1992, the Plaintiffs filed motions to preliminarily enjoin the enforcement of Amendment 2 (v. 1, pp. 185-87, 191-93), which was to go into effect on or before January 15, 1993.[4] In those motions, the Plaintiffs claimed only that Amendment 2 violated the United States Constitution by infringing upon their First Amendment right of free expression and their Fourteenth Amendment right to equal protection of the laws (v. 1, pp. 126-81, 194-218).[5] With respect to the latter claim, the Plaintiffs argued that the State was required to show considerably more than a rational basis for Amendment 2 because it infringed upon homosexuals' and bisexuals' fundamental rights to vote, petition for redress of grievances, and participate equally in state and local political processes (v. 1, pp. 154-71, 205-10; v. 6, pp. 106-08).

The court below held an evidentiary hearing January 11-14, 1993 (v. 2-v. 7). Although the Plaintiffs introduced evidence

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[3]Except to the extent it would violate the federal constitution, an amendment to the state constitution cannot violate the state constitution. Compare Colo. Const. art. II, § 2. Simply put, "[t]he people can do any thing by constitutional amendment unless prohibited by the terms of the Constitution of the United States." Cooper Motors, Inc. v. Board of County Comm'rs, 131 Colo. 78, 84, 279 P.2d 685, 688 (1955).

[4]A state constitutional amendment passed through the initiative process "shall take effect from and after the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed." Colo. Const. art. V, § 1.

[5]The State opposed these motions, and filed a Motion to Dismiss an Amended Complaint, on the grounds that Amendment 2 was facially constitutional, and must be upheld as a matter of law.

federal constitutions (v. 1, pp. 1-13, 111-22).[1]

On December 22, 1971 and December 28, 1971, the plaintiffs filed motions to preliminarily enjoin the enforcement of Amendment 2 (v. 1, pp. 123-27, 141-43), which was to go into effect on or before January 10, 1972.[2] In those motions, the plaintiffs claimed only that Amendment 2 violated the United States Constitution by infringing upon their First Amendment right of free expression and their Fourteenth Amendment right to equal protection of the laws (v. 1, pp. 123-41, 144-140).[3] With respect to the latter claim, the plaintiffs argued that the state was required to show considerably more than a rational basis for Amendment 2 because it infringed upon fundamental and discrete[4] fundamental rights to vote, petition for redress of grievances, and participate equally in state and local political processes (v. 1, pp. 131-41, 329-49; v. 4, pp. 104-28).

The court below held an evidentiary hearing January 11-12, 1972 (v. 5+v, 3). Although the plaintiffs introduced evidence

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[1] Compare to the extent it would violate the federal constitution, as amended by the state constitution cannot violate the state constitution, Peggins Cole. Constr. Co., 11 S.W. 2 Ariz. 367, 71 P. 2d 269, 271 (1937).

[2] A state constitutional amendment passed through the initiative process "shall take effect from and after the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed." Colo. Const. art. V, § 1.

[3] The courts rejected these motions, and filed a motion to Dismiss as an amended Complaint, on the grounds that Amendment 2 was facially constitutional, and must be upheld as a matter of law.

concerning the adoption of various antidiscrimination laws and policies, and the desirability of having such laws and policies, the lower court did not rely on any of the Plaintiffs' profferred facts.

The Defendants argued that Amendment 2 only barred special civil rights protections which were not available to homosexuals and bisexuals under federal law (v. 1, pp. 55-59; v. 2, pp. 320-21, 341-42; v. 6, pp. 120-26). To this end, the Defendants introduced Amendment 2's legislative history (Defendant's Exhibit C), which included the Legislative Council analysis, 204,000 copies of which were distributed statewide to the voters (v. 3, pp. 65-66). Significantly, that analysis did not include any of the irrational fears the Plaintiffs pointed to as supporting the amendment.[6] In fact, the legislative history is replete with references to the wide range of legitimate motivations underlying Amendment 2, including: (1) the accurate belief that extension of special protections on the basis of homosexuality or bisexuality is unwarranted under current U.S. Supreme Court and other federal authorities;[7] (2) the ease by which special class status could be

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[6]Compare Plaintiffs' Brief in Support of Preliminary Injunction (v. 1, pp. 137-38, 173) with Defendants' Exhibit "C": Legislative Council of the Colorado General Assembly, An Analysis of 1992 Ballot Proposals (Research Pub. No. 369, 1992), a copy of which is attached to the end of this brief.

[7]Defendants' Exhibit "C": An Analysis of 1992 Ballot Proposals at 10-11; Letter from Colorado for Family Values Director Kevin Tebedo to Stan Elofson, Colorado Legislative Council (July 23, 1992); statement by Tony Marco submitted to the Colorado Legislative Council (1991) at 24-30.

exploited;[8] (3) the unjustifiable dilution of both public respect and resources for current civil rights programs which would result from extending special class protections to homosexuals and bisexuals;[9] (4) the existence of a significant issue regarding whether behavioral inclinations which are perceived to be immoral ought to serve as the basis for special protections;[10] and (5) the desire to further associational and religious rights.[11] Indeed, Coloradans were shown to be largely tolerant of homosexuals[12] and the Plaintiffs' witnesses admitted that people did not have to be bigots to vote for Amendment 2 (v. 4, pp. 69, 161; v. 5, pp. 63-64); cf. v. 3, p. 131; v. 5, p. 115).

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[8]Defendants' Exhibit "C": Letter from Kevin Tebedo; Letter from John N. Franklin, former Chairman of the Colorado Civil Rights Commission (Mar. 4, 1992). See also Testimony of John N. Franklin (v. 6, pp. 14, 19, 52).

[9]See Defendants' Exhibit "C": An Analysis of 1992 Ballot Proposals at 11; Letter of John N. Franklin, former Chairman of the Colorado Civil Rights Commission. See also testimony of John N. Franklin, v. 6, pp. 14, 18).

[10]Defendants' Exhibit "C": Letter of Kevin Tebedo.

[11]Defendants' Exhibit "C": An Analysis of 1992 Ballot Proposals at 11; statement of Marcos at 21.

[12]A recent poll introduced into evidence by defendants revealed that: (a) 81% of those surveyed agreed that, except for their choice of sexual partners, homosexuals are not really different from anyone else; (b) 59% thought homosexuals should be allowed to serve in the military; (c) only 6% thought homosexuals were more likely than heterosexuals to sexually molest children; (d) only 13% thought homosexual behavior ought to be against the law; (e) 73% thought a majority of the electorate voted for Amendment 2 in opposition to laws that would give homosexuals a type of special or protected status; and (f) only 10% thought the majority voted for Amendment 2 because they hate homosexuals. See Defendants' Exhibit "B", Talmey-Drake Research & Strategy Poll, pp. 2, 4-5; see also testimony of Paul Talmey (v. 6, pp. 53-81, 98-99).

Following the conclusion of legal argument on January 14, 1993, the lower court granted a temporary restraining order to permit it to more fully analyze the parties' positions (v. 6, pp. 146-47). On January 15, 1993, the court enjoined Defendants Romer and Norton from enforcing Amendment 2 pending the outcome of a trial on the merits, finding that the Plaintiffs had met all six prongs of the test for obtaining preliminary relief[13] by demonstrating a reasonable probability that Amendment 2 violates the Equal Protection Clause of the federal constitution. (v. 7, pp. 5-6, 18-21, 23-28, 30).[14]

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[13]Plaintiffs had the burden of showing: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable harm which could be prevented by injunctive relief; (3) the nonexistence of a plain, speedy, and adequate remedy at law; (4) the granting of a preliminary injunction will not disserve the public interest; (5) the balance of equities favors the injunction; and (6) the injunction will preserve a status quo pending a trial on the merits. Rathke v. MacFarlane, 648 P.2d 648, 653-54 (Colo. 1982). The court's ruling collapsed these six factors into the first: whether plaintiffs could show a reasonable probability of success on the merits.

[14]The lower court's ruling appears to presume the governmental Plaintiffs had standing to bring this action. However, the municipal Plain-tiffs have failed to allege any legally protected interest which is, or may be affected by, Amendment 2, and so lack standing to sue, much less seek an injunction, against the State. Board of County Comm'rs v. Fifty-First General Assembly, 198 Colo. 302, 304-05, 599 P.2d 887, 889 (1979). See also City and County of Denver v. State, 788 P.2d 764, 767 (Colo. 1990); National Advertising Co. v. Department of Highways, 751 P.2d 632, 635 (Colo. 1988); City & County of Denver v. Colorado River Water Conservation Dist., 696 P.2d 730, 740 (Colo. 1985). This standing analysis would also apply, with even more force, to the Boulder Valley School District. Union High School Dist. No. 2 v. Paul, 105 Colo. 93, 95 P.2d 5 (1939). See also East Jackson Public Schools v. Michigan, 133 Mich. App. 132, 348 N.W.2d 303 (1984). "[T]he equal protection clause of the Fourteenth Amendment was not designed to protect state instrumentalities against state action, much less against the constitutional right of the people 'to alter and abolish their constitution and form of government whenever they

The lower court reached this conclusion by finding that Amendment 2 must be justified by a compelling state interest because it infringes upon a fundamental right. Significantly, however, the fundamental right identified by the court was not any of those urged by the Plaintiffs, but an entirely different one.[15] According to the court, the fundamental right which Amendment 2 infringes upon is the "right not to have the State endorse and give effect to private biases" affecting "an identifiable class" (v. 7, pp. 28-29). The Plaintiffs had not alleged in their Amended Complaint (v. 1, pp. 111-25), and specifically abandoned in their preliminary injunction motions, any claim that homosexuals and bisexuals constitute a "suspect" class (v. 1, pp. 163-64).

The lower court did not base its decision on any direct precedent; instead it cited an "evolv[ing]," "grow[ing]," and "chang[ing]" notion of the law (v. 7, p. 21), based on perceived

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may deem it necessary to their safety and happiness . . . .'" Board of County Comm'rs v. City and County of Denver, 150 Colo. 198, 205, 372 P.2d 152, 156 (1962)(quoting Colo. Const. art. II, § 2).

[15]It was not surprising that the lower court rejected the Plaintiffs' claims. Neither the fundamental right to vote, nor that to petition government, encompass a right to require a particular governmental entity to entertain matters which are beyond its authority to address. See generally, Higginson, A Short History of the Right to Petition Government for the Redress of Grievances, 96 Yale L.J. 142, 142-43, 159-61, 165-66 (1986). See also Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464-65 (1979). Furthermore, a state constitutional provision like Amendment 2 presents an equal protection problem only when it disadvantages a racial minority or, at most, a group which would qualify as a "suspect" class. See generally Note, The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy, 38 Vand. L. Rev. 421 (1985); Washington v. Seattle School Dist., 458 U.S. 457, 470, 485-86 (1982); James v. Valtierra, 402 U.S. 137, 141-42 (1971).

"evolving standards of decency" (v. 7, pp. 22, 30), extrapolated from several federal court decisions (v. 7, pp. 24-30). More specifically, the court below identified the "right" by noting that the U.S. Supreme Court had: (1) voted 5-4 in 1967 to invalidate state support of private racial discrimination in housing matters; (2) voted 9-0 in 1984 to support language indicating that the law could neither directly nor indirectly give effect to private biases; and, (3) subsequently invoked this principle in a case which did not involve racial discrimination (v. 7, pp. 24-28). The lower court then held, in an unprecedented decision, that this "right" was applicable here, because Amendment 2 affected homosexuals and bisexuals based on considerations of status rather than individual conduct (v. 7, pp. 28-29).[16]

As will be demonstrated infra, the lower court's order was fundamentally flawed, and cannot be sustained.[17]

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[16]The court below cited: (1) Weems v. United States, 217 U.S. 349 (1910), and Trop v. Dulles, 356 U.S. 86 (1958), in support of its "evolving standards of decency" approach to the issue; (2) Reitman v. Mulkey, 387 U.S. 369 (1967), Palmore v. Sidoti, 466 U.S. 429 (1984), City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), and Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), in support of its recognition of the fundamental "right" not to have government give effect to private biases; and (3) Robinson v. California, 370 U.S. 660 (1962), in support of the distinction it drew between "status" and "conduct" (v. 7, pp. 21-30).

[17]The lower court's injunction only specifically enjoined the Governor and Attorney General from enforcing Amendment 2 or issuing the formal proclamation described in art. V, § 4 of the Colorado Constitution. However, it appears that the Governor's failure to issue the proclamation does not bar the Amendment from becoming part of the Constitution. Accordingly, Amendment 2 may currently be a self-executing and effective part of the Colorado Constitution. The court below did not specify whether private parties could assert it as a defense against enforcement actions under the Denver, Boulder, or Aspen ordinances, or whether the

SUMMARY OF ARGUMENT

1. Normally, a trial court's decision to grant or deny a preliminary injunction is reviewable on appeal under an abuse of discretion standard. Where, however, the lower court's decision rests wholly on questions of law, it is subject to independent, de novo review by this Court.

2. Amendment 2 does not deprive homosexuals and bisexuals of any basic civil right; it simply aligns the rights of the citizens throughout the State with those provided by federal law and generally existing throughout the rest of the country.

3. The lower court erred in holding that Amendment 2's restrictions on governmental action infringe upon a fundamental right. More specifically, the court erred by converting the rational basis test into a new fundamental right.

4. Sufficient legitimate grounds exist to uphold the validity of Amendment 2 under the rational basis test.

ARGUMENT

I. THE DISTRICT COURT'S DECISION RESTS WHOLLY ON QUESTIONS OF LAW WHICH ARE SUBJECT TO INDEPENDENT, DE NOVO REVIEW BY THIS COURT

"The grant or denial of a preliminary injunction is a decision which lies within the sound discretion of the trial court." Rathke v. MacFarlane, 648 P.2d 648, 653 (Colo. 1982). Normally, appellate

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municipal ordinances retained their validity.

review of discretionary decisions is highly deferential in nature, determining only whether the lower court's action fell within a range of reasonable choices or was manifestly unreasonable, arbitrary, or unfair. E.g., People v. Milton, 732 P.2d 1199, 1207 (Colo. 1987). Where, as here, however, the issues involve only questions of law (i.e., interpreting Amendment 2 and determining the appropriate legal standards for assessing its validity), the lower court's decision is subject to independent review by this Court. Accord Bloomer v. Boulder County Board of Comm'rs, 799 P.2d 942, 944 (Colo. 1990) ("Interpretation of statutes is a question of law, and appellate courts need not defer to the trial court's interpretation."); Lafferty v. Cook, 949 F.2d 1546, 1550 (10th Cir. 1991), cert. denied, 112 S. Ct. 1942 (1992) (constitutional standard is question of law subject to de novo review). See also Wakabayashi v. Tooley, 648 P.2d 655, 658 (Colo. 1982)(reversing district court's grant of preliminary injunction for use of inappropriate legal standards).

Significantly, after taking evidence for four days, the lower court did not rely on any facts whatsoever in reaching its conclusions. This highlights what this case is really about: a declaratory judgment regarding the facial constitutionality of Amendment 2. As the lower court's decision reflects, the issues presented are wholly questions of law, which are ultimately the province of this Court. Accordingly, this Court should not hesitate to authoritatively resolve the legal questions surrounding Amendment 2.

II. AMENDMENT 2 DOES NOT DEPRIVE HOMOSEXUALS AND BISEXUALS OF ANY FUNDAMENTAL CIVIL RIGHT

In order to fully understand the issues here, it is first necessary to understand the scope and meaning of Amendment 2. Amendment 2: (1) prohibits the State or any of its branches, departments, or political subdivisions; (2) from enacting, adopting, or enforcing any statute, regulation, ordinance or policy; (3) recognizing a claim (and the concomitant benefits) of minority status, quota preferences, protected status, or discrimination; (4) premised on homosexual or bisexual orientation, conduct, practices, or relationships.

Amendment 2's prohibition on the enactment or adoption of state or local laws or policies according "minority status," "quota preferences," and "protected status," premised on homosexual or bisexual "orientation, conduct, practices or relationships" is readily understandable. The terms "minority status," "quota preferences," and "protected status," are commonly used in the federal civil rights context to refer to those classes of individuals for whom special consideration, treatment, or protection is given.[18] And, the phrase "orientation, conduct, practices or relationships" is easily understood as referring to inclinations,

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[18] E.g., Salas v. Southwest Texas Junior College Dist., 964 F.2d 1542, 1549 (5th Cir. 1992)(word "minority" used in civil rights cases to denote a racial or social group, not a numerical percentage); Penthouse International, Ltd. v. Meese, 939 F.2d 1011, 1017 (D.C. Cir. 1991)("minority status"); H.K. Porter Co., Inc. v. Metropolitan Dade County, 975 F.2d 762, 766 (11th Cir. 1992)(use of "quotas" to alleviate effects of past discrimination); Ortega v. Safeway Stores, Inc., 943 F.2d 1230, 1236 (10th Cir. 1991)("protected status").

acts, and romantic or passionate attachments.[19]

The pivotal issue here is the extent to which state and local governments are prohibited from "enforcing" "any" law or policy which would entitle those of homosexual or bisexual orientation from raising a "claim of discrimination." The Plaintiffs, and implicitly the court below, eschewed the reasonable and fair constitutional interpretation ascribed to Amendment 2 by the Defendants, in favor of a parade of horribles having no foundation in fact. It is wrong to suggest, as the Plaintiffs did below, that Amendment 2 leaves homosexuals and bisexuals wholly defenseless against those who would discriminate against them, or prohibits the state judiciary from adjudicating "claims of discrimination" which could otherwise have been brought by those individuals under federal law.

Where the scope of a constitutional provision is uncertain, the limit of the purpose marks the limit of the rule. Lancaster v. Board of Comm'rs of Jefferson County, 115 Colo. 261, 265, 171 P.2d 987, 989 (1946). In determining the purpose of the amendment, a court should consider the state of things existing when the amendment was adopted, cf. Krutka v. Spinuzzi, 153 Colo. 115, 123, 384 P.2d 928, 933 (1963)(original constitution), the object to be

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[19]"[O]rientation" is synonymous with "preference," see Opinion of the Justices to the Senate, 390 Mass. 1201, 458 N.E.2d 1192, 1194 (1984)("sexual preference" is not vague, because it is synonymous with "sexual orientation"); "conduct" and "practices," refer, respectively, to "mode of action" and "customs," Black's Law Dictionary 295, 1172 (6th ed. 1990); and "relationships" refers to "the relation[s] connecting or binding participants in . . . relationship[s] . . . romantic or passionate attachment[s]," Webster's Ninth New College Dictionary 994.

accomplished, and the mischief to be avoided as a result of the amendment. People v. Y.D.M., 197 Colo. 403, 407, 593 P.2d 1356, 1359 (1979). In this respect, the Colorado Legislative Council's analysis of the amendment provides important insight into the electorate's understanding of the amendment when it passed. Carrera Place, Ltd. v. Arapahoe County Bd. of Equalization, 761 P.2d 197, 203 (Colo. 1988).

At the time the amendment was proposed (as well as currently), federal case and statutory law identified several groups or classes of individuals as appropriate for "special protection" against discrimination. Generally speaking, individuals are protected under the Fourteenth Amendment's Equal Protection Clause only from arbitrary governmental discrimination, and not at all as to private discrimination. The United States Supreme Court has identified a handful of classifications warranting heightened scrutiny to guard against discriminatory governmental actions.[20] Moreover, Congress has enacted legislation protecting some, but not all of these, and a number of other classifications from both public and private discrimination.[21] Homosexual or bisexual orientation has never

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[20]Loving v. Virginia, 388 U.S. 1, 11 (1967)(racial status, suspect class); Korematsu v. United States, 323 U.S. 214, 216 (1944)(national ancestry and ethnic origin, suspect class); Graham v. Richardson, 403 U.S. 365, 372 (1971)(alienage, suspect class); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (gender, quasi-suspect class); and Lalli v. Lalli, 439 U.S. 259, 265 (1978) (illegitimacy, quasi-suspect class).

[21]E.g., 5 U.S.C. § 5550a (religious practices); 20 U.S.C. § 1681 (sex); 29 U.S.C. §§ 206 (sex), 621 (age), 701 (handicapped); 42 U.S.C. §§ 1981 (race), 1982 (age), 2000d (race, color, national origin), 2000e (race, sex, religion, national origin), 12101, et seq. (disability).

been identified by the federal appellate courts or Congress as a basis for providing any special treatment; sexual orientation is not a classification which warrants any protection beyond that normally accorded to all citizens under the Equal Protection Clause of the Fourteenth Amendment.

However, in Colorado at the time Amendment 2 was proposed, three home rule cities (Denver, Boulder, and Aspen) had ordinances prohibiting discrimination based on sexual orientation in jobs, housing, and public accommodations; the Colorado Civil Rights Commission had voted to recommend that the General Assembly extend the State's civil rights act to ban discrimination based upon sexual orientation; the Governor had issued an executive order prohibiting job discrimination for state classified employees based on sexual orientation; at least two state colleges had policies prohibiting discrimination based on sexual orientation; and the General Assembly had enacted a statute prohibiting health insurance companies from determining insurability based on one's sexual orientation. Legislative Council of the Colorado General Assembly, An Analysis of 1992 Ballot Proposals (Research Publ. No. 369, 1992) 10. These antidiscrimination provisions were obviously meant to protect homosexuals and bisexuals, since heterosexuals had not been subjected to any significant amount or type of private or public discrimination.[22]

As Amendment 2's legislative history makes clear, its backers

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[22]Indeed, the record reflects that homosexuals and bisexuals provided the main impetus for these provisions (v. 4, pp. 50-52, 146-59, 168-78; v. 5, pp. 42-57, 132-47).

were concerned with two things: 1) nullifying the effect of existing state and local laws or policies which prohibited discrimination based on homosexual or bisexual orientation; and 2) ensuring that state and local authorities could not adopt new laws or policies which would have this effect. An Analysis of 1992 Ballot Proposals at 16-17. Properly analyzed, the guiding intent behind Amendment 2 was not to deprive homosexuals or bisexuals of any constitutionally guaranteed rights, but to remove any state-based grounds for putting such individuals in a more favorable position vís-a-vís other citizens than would be required under federal law. Simply put, the intent was to realign the rights of the citizenry of this State with those provided by federal law and generally recognized throughout the rest of the country.[23]

Having this in mind, and recognizing the constitutional supremacy problem created when a state court cannot, contrary to congressional intent, entertain a federal cause of action, e.g. Howlett by and through Howlett v. Rose, 496 U.S. 356, 369-71 (1990), the amendment prohibits only the enforcement of state or locally based claims of discrimination, and not the enforcement of federally based claims of discrimination. This interpretation, which is also consistent with the principle of ejusdem generis, see Colorado Common Cause v. Meyer, 758 P.2d 153, 162 (Colo. 1988),

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[23]Nationwide, only six States, eight other governors, 110 cities and counties in 25 States, and 65 universities had adopted anti-discrimination laws or policies with respect to sexual orientation. An Analysis of 1992 Ballot Proposals at 15.

accomplishes the underlying purpose of the amendment. See, e.g. Parrish v. Lamm, 758 P.2d 1356, 1369 (Colo. 1988)(court accomplishes legislative purpose, and avoids constitutional issue, by construing word "determines" to mean "reasonably determines").

Amendment 2 neither affirmatively authorizes, encourages, nor establishes discrimination based upon sexual orientation, nor bars homosexuals and bisexuals from having federally-based discrimination suits adjudicated in state court. It does not leave homosexuals and bisexuals unprotected from governmental or private discrimination per se. The government must always have a rational basis to discriminate against homosexuals and bisexuals, and that rational basis must be applied to the specific context under consideration. No government can, for instance, make employment decisions about homosexuals and bisexuals for reasons which are irrelevant to the performance of a particular job.[24] Nor can government deny to homosexuals and bisexuals the protections provided by law enforcement authorities. Similarly, Amendment 2 does not immunize private citizens from criminal (or civil) responsibility for harassment or assaults, and confers no right upon private citizens to avoid contract obligations entered into with homosexuals and bisexuals.[25] All Amendment 2 does -- for the

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[24]E.g., Gay Law Students Ass'n v. Pacific Tel. & Tel., 595 P.2d 592, 597 (Cal. 1979)(state cannot exclude homosexuals as a class from employment "without a showing the individual's homosexuality renders him unfit for the job from which he's been excluded.") See also Padula v. Webster, 822 F.2d 97, 104 (D.C. Cir. 1987)(FBI employment context).

[25]Cf. An Analysis of 1992 Ballot Proposals at 11.

private citizen -- is ensure that government will not interfere with his or her choice about associating with homosexuals and bisexuals.

III. THE LOWER COURT ERRED IN HOLDING THAT AMENDMENT 2'S RESTRICTIONS ON GOVERNMENTAL ACTION INFRINGE UPON A FUNDAMENTAL RIGHT; IT ERRED BY CONVERTING THE RATIONAL BASIS TEST INTO A NEW FUNDAMENTAL RIGHT.

The Fourteenth Amendment's Equal Protection Clause is "essentially a direction that all persons similarly situated . . . be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985).[26] The "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Id. at 440. See Harris v. The Ark, 810 P.2d 226, 230 (Colo. 1991). This general rule gives way, however, in those rare instances when statutes infringe upon fundamental constitutional rights or utilize "suspect" or "quasi-suspect" classifications. Cleburne at 440-41; Harris, 810 P.2d at 230; Parrish v. Lamm, 758 P.2d at 1370. In such cases, the courts apply "heightened" scrutiny requiring the State to show, in cases affecting fundamental rights or "suspect" classes, a "compelling state interest," or, in cases affecting "quasi-suspect" classes, a substantial relationship to a sufficiently important governmental

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[26]Our analysis here is limited to federal constitutional principles, since as noted in footnote 3, supra, Amendment 2 cannot violate the State Constitution.

interest. Cleburne, 473 U.S. at 440-42; Parrish v. Lamm, 758 P.2d at 1370.

Here, the lower court found that Amendment 2 must be supported by a compelling interest because it infringes upon a fundamental "right not to have the State endorse or give effect to private biases" with respect to "an identifiable class."[27] To reach this conclusion, it was necessary for the court to read certain cases out of context, ignore more directly analogous case law, and utilize -- erroneously, and again out of context -- a novel and inapt "evolving standards of decency" test in order to find this "right."

Although the "right" identified by the lower court has a certain superficial appeal, such an appeal is illusory. Our law recognizes that government cannot act arbitrarily, solely on the basis of impermissible types of bias. However, this "right" is already protected through the proper application of the equal protection rational basis test. It is a mistake of law to treat the rational basis test as a fundamental right. This error by the court below is profound, in that it effectively eliminates a

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[27]For good reason, Plaintiffs did not allege in their complaint that they constitute a "suspect" or "quasi-suspect" class. Courts have repeatedly refused to find that homosexuals constitute a suspect class. See, e.g., High Tech Gays v. Defense Investigations Security Clearance Office, 895 F.2d 563, reh'g denied, 909 F.2d 375 (9th cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied sub. nom. 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987); National Gay Task force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1988), aff'd, 470 U.S. 903 (1985); Steffan v. Cheney, 780 F. Supp. 1 (D. D.C. 1991).

universe of acceptable personal judgments -- whether we term them "biases" or "choices" -- as bases for legitimate governmental action.

The power of the people to determine their own government in this State is plenary, subject only to the Constitution of the United States. The people retain the power to alter, or abolish altogether, the State's government. Colo. Const. art. II, § 2. One aspect of the people's supreme power is the initiative, which is reserved to them by themselves to propose laws by petition and to enact or reject them at the polls independent of the General Assembly. Colorado Project-Common Cause v. Anderson, 178 Colo. 1, 4, 495 P.2d 220, 221 (1977). Thus, the lower court's order has direct implications for the right of the people of Colorado to govern themselves.

Our system of government normally presumes that "even improvident decisions will be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." Vance v. Bradley, 440 U.S. 93, 97 (1979).[23] Except where otherwise required by the Constitution, "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33 (1972)(public education not a

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[23]"In considering the constitutionality of a statute, it is not the role of courts 'to determine whether particular legislation is wise or desirable.'" Bloomer v. Boulder County Bd. of Comm'rs, 799 P.2d 942, 947 (Colo. 1990).

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fundamental right). This is because "decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation." Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 790 (1986)(White, J., dissenting) (citation omitted). See also Bowers v. Hardwick, 478 U.S. 186, 194 (1986)("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.")

Consequently, in assessing whether a fundamental right exists, the only question open here is "whether the Supreme Court has created a right which, fairly defined, covers the case before us or whether the Supreme Court has specified a mode of analysis, a methodology, which, honestly applied, reaches the case we must now decide." Dronenburg v. Zech, 741 F.2d 1388, 1396 n.5 (D.C. Cir. 1984). Here, the answer in each instance is the same: no.

A. The "Right" Recognized by the Court Below Has Never Before Been Recognized by Any Court

Obviously, the "right" identified by the lower court has no basis in the text of the Constitution. Instead, the court's decision was largely based upon a misreading of Reitman v. Mulkey, 387 U.S. 369 (1967), and Palmore v. Sidoti, 466 U.S. 435 (1984). In Reitman, the U.S. Supreme Court upheld a state court ruling

invalidating a state constitutional amendment, on the theory that it promoted racial discrimination in housing matters; and, in Palmore, the Court invalidated a child custody order which was based solely on a judicial determination that it would be harmful to a child to remain in a racially mixed household. In each case, the U.S. Supreme Court said something that the lower court seized upon: in Reitman, the Supreme Court condemned creating a private right to discriminate on racial grounds free from any possibility of censure or interference from official sources; and, in Palmore, the Court said the law cannot either directly or indirectly give effect to private biases (v. 7, pp. 24-26). See Reitman, 387 U.S. at 377; Palmore, 466 U.S. at 433.

The court below took the Reitman and Palmore language completely out of context and distorted its significance. Reitman has never been cited as controlling authority by the U.S. Supreme Court, and it has never previously been held, either alone or in combination with such cases as Palmore, to create a fundamental right not to have a State endorse or give effect to any type or degree of private bias. See e.g., Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 656-59 (Cal. App. 4th Dist. 1991)(citing Reitman and Palmore only to support use of a rational basis test to analyze ordinance affecting homosexuals and AIDS sufferers). Cf. Pruitt v. Cheney, 963 F.2d 1160, 1166 (9th Cir. 1991)(citing Palmore as support only for decision to subject military regulation banning homosexuals to review under an "active" rational basis standard).

Punishment Clause of the Eighth Amendment.[41]

The court below found that language in both Weems v. United States, 217 U.S. 349, 378 (1910)("The clause of the Constitution in the opinion of the learned commentators may be, therefore, progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice"), and Trop v. Dulles, 356 U.S. 86, 101 (1958)("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society") validate the creation of new fundamental "rights" based upon judicial conceptions of social progress. However, neither Weems nor Trop stands for any such thing.

Weems involved a constitutional challenge to a criminal conviction.[42] At issue was the proportionality of a criminal sentence to the punishment imposed. The Court employed the language quoted by the lower court here to buttress its conclusion that what the nation might have accepted as an appropriate punishment in one era might now be found to be "cruel and unusual." Finding the sentence before it to be grossly disproportional, the Court found a violation of the Eighth Amendment. 217 U.S. at 381.

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[41]U.S. Const. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[42]Strictly speaking, Weems v. United States, 217 U.S. 349 (1910) was not even an Eighth Amendment case, but involved the interpretation of the territorial bill of rights governing the Philippine Islands during the period of American administration. However, the Court interpreted the territorial cruel and unusual punishment prohibition identically to the Eighth Amendment. 217 U.S. at 367.

Trop v. Dulles was also an Eighth Amendment case. At issue there was a law which stripped citizenship rights from persons deserting the armed forces. A mere plurality of the Court found that this sanction resulted in "the total destruction of the individual's status in organized society," thereby violating the Cruel and Unusual Punishment Clause. 356 U.S. at 101.

The language the lower court appropriated to reach its conclusion simply has no applicability outside the context of a criminal conviction; Weems and Trop have, like Robinson, been expressly so confined. In the context of the case at bar, the lower court's "reliance [upon Weems, Trop, and Robinson] is misplaced. Our Eighth Amendment decisions have referred to 'evolving standards of decency,' only in determining whether punishments are 'cruel and unusual' under the Amendment." Ingraham v. Wright, 430 U.S. 651, 668 n.36 (1977) (refusing to extend "evolving standards of decency" or "enlightenment by a humane justice" to protect school children from corporal punishment). Therefore, it is not surprising that the Court has gone to great lengths to resist extending Weems, Trop, and Robinson beyond the narrow confines of the Eighth Amendment.[43] "The constitutional rule we are urged to adopt is not merely revolutionary -- it departs from the ancient faith based on the premise that experience in making local laws by local people themselves is by far the

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[43]See, e.g., Ingraham v. Wright, 430 U.S. at 668 (citing Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893)(holding Eighth Amendment inapplicable to deportation of aliens on the ground that "deportation is not a punishment for a crime.")

safest guide for a nation like ours to follow." Ingraham, 430 U.S. at 670 n.39 (quoting Powell v. Texas, 392 U.S. 514, 547-48 (1968) (opinion of Black, J.))

Although the late Justice Thurgood Marshall proposed replacing the traditional fundamental right/suspect class equal protection analysis with an "evolving standards of equality" test echoed by the court below, see Cleburne, 473 U.S. at 466-67, 470, 472 (Marshall, J., concurring and dissenting), this type of analysis has never been accepted by a majority of the U.S. Supreme Court. Such an analysis would elevate to paramount importance one of but three considerations ordinarily used to assess "suspect" or "quasi-suspect" class protection.[44] Given its extreme reluctance to expand "suspect" or "quasi-suspect" class protection, see Cleburne, 473 U.S. at 441, the Court would hardly be amenable to achieving that very result by disguising a truncated version of the "suspect" class inquiry under a new label (i.e., "fundamental right").

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[44]See, e.g., Bowen v. Gilliard, 483 U.S. 587, 602-03 (1987) (suspect or quasi-suspect class inquiry focuses on whether: (1) there has been a history of discrimination against the group; (2) the group exhibits obvious, immutable, or distinguishing characteristics; and, (3) the group is politically powerless, in the sense of an inability to attract the attention of lawmakers). Accord Cleburne, 473 U.S. at 440-47; High Tech Gays, 895 F.2d at 573-74.

C. Under Any Recognized Constitutional Theory, New "Rights" Can Only Be Recognized By Reference to Objective Criteria

Under either established methodologies or the "evolving standards of decency" approach advocated by the court below, the court below could not base its decision -- as it did here -- on the out-of-context, or even anticipated, views of individual justices of the U.S. Supreme Court. This follows, because even the "evolving standards of decency" test

> has never been thought [to be] a shorthand reference to the preferences of a majority of this Court. By reaching a decision supported neither by constitutional text nor by the demonstrable current standards of our citizens, the dissent displays a failure to appreciate that 'those institutions which the Constitution is supposed to limit' include the Court itself. To say, as the dissent says, that 'it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty,' -- and to mean that as the dissent means it, i.e., that it is for us to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive society through its democratic processes now overwhelmingly disapproves, but on what we think 'proportionate' and 'measurably contributory to acceptable goals of punishment' -- to say and mean that, is to replace judges of the law with a committee of philosopher-kings.

Stanford v. Kentucky, 492 U.S. 361, 378-79 (1989)(death penalty for 16 and 17 year olds not cruel and unusual punishment)(emphasis in original). Indeed, this Court recently rejected a subjective "evolving standards" concept because it "does not explain how we are to determine the nature of contemporary standards of decency without regard to legislative judgment and without popular sentiment but also avoid substituting our personal sense of

morality for that of the majority of the people." People v. Davis, 794 P.2d 159, 171 (Colo. 1990).

It is for this reason that the U.S. Supreme Court has mandated recourse to consensus for determining "evolving standards of decency." See McKleskey v. Kemp, 481 U.S. 279, 300 (1987)(citing Gregg v. Georgia, 428 U.S. 153, 173, 175 (1976))("In assessing contemporary values, we have eschewed subjective judgment, and instead have sought to ascertain 'objective indicia that reflect the public attitude toward a given sanction.'") There can be no more authoritative measure of popular attitude than the endorsement of Amendment 2 by the citizens of this State through a plebiscite.

It is not, of course, incumbent upon Colorado to establish a national consensus approving Amendment 2; rather, it is the Plaintiffs' "heavy burden" to demonstrate a national consensus in favor of special or additional legal protections for homosexuals and bisexuals. Cf. Stanford, 492 U.S. at 373. However, the Plaintiffs cannot carry that burden. See Defendant's Argument II, supra. Cf. Dronenburg, 741 F.2d at 1397 ("[I]f the revolution in sexual mores that the appellant proclaims is ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court.")

The other objective criteria recognized by the U.S. Supreme Court in the fundamental rights methodology is tradition. See Bowers v. Hardwick, 478 U.S. at 192-94. There can be no question

that the "right" identified by the lower court represents an extraordinary departure from our traditions. Indeed, a right which is only found in evolving standards of decency can hardly be said to be "deeply rooted in this Nation's history and tradition." For example, the lower court's ruling calls into question the validity of Colorado's marriage statute, which limits marriages to heterosexual relationships. See §§ 14-2-101, et seq., C.R.S. (1987); Adams v. Howerton, 486 F. Supp. 1119 (S.D. Cal. 1980), aff'd, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982). The same type or degree of "private bias" underlying Amendment 2 may be said to underlie marriage laws as well. Yet, numerous courts have upheld statutes excluding same-sex marriages under a rational basis test because "marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race . . . ." Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187, 1194 (1974). Accord Adams v. Howerton, supra; Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971); In re Estate of Cooper, 149 Misc. 2d 282, 564 N.Y.S. 2d 684, 687 (N.Y. Surr. Ct. 1990)("The Legislature has chosen to restrict the right to marry to people of the opposite sex, a classification which has a rational basis and which does not offend the equal protection right of the Fourteenth Amendment . . . ."); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973)("We find no constitutional sanction or protection of the right to marriage between persons of the same sex.")

In fact, all laws must be said to embody some sort of "private

bias," given that each legislator, each citizen, has their own reasons for supporting or rejecting any proposed public policy. Any attempted distinction between so-called "private biases" -- which are impermissible -- and "public biases" -- which are not -- is illusory. In truth, "private bias" is nothing more than the individual liberty which this nation has cherished for over two centuries. At the heart of that individual liberty is the freedom to make personal choices regarding with whom one wishes to associate, and how one wishes to be governed.[45] "Private bias," then, is the basis upon which we govern ourselves.[46]

It is therefore not surprising that the U.S. Supreme Court has unequivocally -- and recently -- rejected any theory that heightened scrutiny is required simply because the discriminatory impact of government action may in some way endorse or give effect to some type of private bias or prejudice. In Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 538-39 (1982), the Court found that there, as here, government can rescind any additional

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[45]Indeed, the public debate surrounding Amendment 2 has much to do with government's involvement in these choices.

[46]For example, bigamy laws give effect to private biases regarding plural marriages; prohibitions on incest give effect to private biases against persons who wish to have sex with members of their own families; and prohibitions on Sunday liquor sales give effect to private biases to the detriment of those who attach no particular significance to the seventh day of the week. Nonetheless, all of these are patently constitutional. E.g., Braunfield v. Brown, 366 U.S. 599 (1961); Reynolds v. United States, 98 U.S. 145 (1878). "The law, however, is constantly based on notions of morality, and if all laws representing moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

protections not required by the federal constitution.[47] In Cleburne, where government denied a permit to provide housing to mentally retarded individuals, the Court did not characterize this action as abridging a fundamental right, but looked to see whether there was a rational basis apart from the admittedly present prejudice to support government action. And, as recently as 1991, the Court in Gregory evaluated a State's mandatory retirement scheme for judges under the rational basis test, despite the obvious fact the scheme discriminated against a group -- the elderly -- which has been, and still is, the subject of a certain amount of private bias and prejudice. See, e.g., Murgia, 427 U.S. at 313 ("[T]he treatment of the aged in this Nation has not been wholly free of discrimination . . . .") Against this background, to claim that a right to special or additional protections for homosexuals and bisexuals "is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." See Bowers v. Hardwick, 478 U.S. at 194.

Properly analyzed, then, neither the "implicit concept of ordered liberty," "deeply rooted in tradition," nor "evolving standards of decency" tests can be applied on the basis of a comparative Supreme Court justice vote tally in two race-related civil rights cases. These tests depend upon objective factors

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[47]The case involved a state constitutional amendment prohibiting state courts from ordering forced busing for desegregation unless there was a violation of the United States Constitution.

relating either to consensus of opinion or deeply rooted traditions. Neither consensus nor tradition support the "right" recognized by the lower court.

Importantly, recognition of new "rights" without regard to constitutional text, traditions, or consensus undercuts the rule of law by directly abrogating the doctrine of stare decisis. "When the Court ventures further and defines as 'fundamental' liberties that are nowhere mentioned in the Constitution (or that are present in the so-called 'penumbras' of specifically enumerated rights), it must, of necessity, act with more caution, lest it open itself to the accusation that, in identifying constitutional principles to which the people have consented in framing their Constitution, the Court has done nothing more than impose its own controversial choices of value upon the people." Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 790 (1986)(White, J., dissenting). For this reason, courts should be very hesitant about recognizing new fundamental rights with far-reaching ramifications, taking care to heed John Adams' admonition that America ought to be "an empire of laws, and not of men."[48]

These concerns have particular force when recognition of a new "right" thwarts the will of the people, thereby derogating their ability to govern themselves. The right to self-government is so central to the fabric of our society that it must not be subverted

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[48]John Adams, Thoughts on Government (1776). See also B. Cardozo, The Nature of the Judicial Process 136 (1921). ("Benevolent judges empowered to adjudicate according to their individual sense of justice might produce a benevolent despotism, but such a regime would put an end to the reign of law.")

by the recognition of a purported "right" which is unsupported by case law, national consensus, or deeply-rooted national traditions. These sentiments were echoed by the eminent Judge Learned Hand:

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have the satisfaction in the sense that we are all engaged in a common venture. If you retort that a sheep in the flock may feel something like it; I reply, following Saint Francis, "My brother, the Sheep."

Hand, The Bill of Rights 73-74 (Atheneum ed. 1977).

The lower court's ruling cannot be sustained. The right it attempted to identify is not fundamental in nature, but is simply a misstatement of the rational basis test. Furthermore, the rational basis test itself does not eliminate permissible types of "private biases" -- personal choices and attitudes -- from validating governmental action. Since there is no fundamental right involved here, Amendment 2 must be analyzed only with respect to whether it is justified by an adequate rational basis.

IV. AMENDMENT 2 IS JUSTIFIED BY ADEQUATE RATIONAL BASES

Given that Amendment 2 does not infringe upon any fundamental right, in order to prevail, the Plaintiffs must demonstrate that no rational relation exists between the legitimate goals and the effects of Amendment 2. Colorado Dep't of Social Services v. Board

of County Comm'rs of Pueblo County, 697 P.2d 1, 15 (Colo. 1985). Under the rational basis test, the United States Supreme Court:

> will not overturn . . . a statute unless the varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Vance v. Bradley, 440 U.S. 93, 97 (1979). Accord Gregory v. Ashcroft, 111 S. Ct. at 2406. See also MSM Farms, Inc. v. Spire, 927 F.2d 330, 333 (8th Cir. 1991)(applying rational basis test to measures adopted through referendum). In applying this test this Court must ask only whether it is conceivable that Amendment 2 bears some rational relationship to any legitimate purpose of government. See Gregory v. Ashcroft, 111 S. Ct. at 2407-08; Pennell v. City of San Jose, 485 U.S. 1, 14 (1988).[49]

As noted earlier, the legitimate goals supporting Amendment 2 as a limitation on governmental action include promoting associational[50] and religious rights,[51] maintaining the integrity

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[49]This Court is not limited to the reasons advanced by the amendment's sponsors. E.g., Thomas v. Sullivan, 922 F.2d 132, 136 (2d Cir. 1990). Rather, the Court must consider any rational purpose possibly motivating its passage. Mountain Water Co. v. Montana Dep't of Public Service Regulation, 919 F.2d 593, 597 (9th Cir. 1990). See also Millis v. Board of County Comm'rs of Larimer County, 626 P.2d 652, 658 (Colo. 1981).

[50]Cf. Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972).

[51]In Aspen, for example, section 13-98 of the sexual orientation ordinance required churches to make their facilities open to homosexual organizations if they opened to any community organization. Moreover, churches apparently could not refuse to hire employees, and presumably pastors or priests, on the basis of their sexual orientation. Similarly, Title 12 of the Boulder municipal code made churches and religious organizations civilly liable for failure to hire or make facilities available to

of established civil right protections, and achieving statewide uniformity on this divisive issue. Even if these grounds were inadequate, Amendment 2 would nonetheless be sustainable under Bowers v. Hardwick, as expressing society's moral judgment that certain behavior or orientation should not give rise to additional legal protections. In this case, society's moral judgment is not that certain persons should be punished for their sexual orientation, but rather that such orientation should not be a basis for additional or special rights.[52] While a state or local government can grant more protection than that required by the United States Constitution, that additional protection can be rescinded without committing a federal constitutional violation. Crawford v. Los Angeles Bd. of Educ., 458 U.S. at 538-39.

CONCLUSION

In sum, Amendment 2 does not embody public or private discrimination in contravention of the Fourteenth Amendment. For the foregoing reasons, the lower court's judgment must be reversed, and its order granting a preliminary injunction vacated.

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homosexuals and bisexuals. In contrast, Denver's ordinance had a religious exemption.

[52]There is "a substantial government interest in protecting order and morality." Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2462 (1991)(plurality opinion)(citing Paris v. Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973); Roth v. United States, 354 U.S. 476, 485 (1957); and Bowers v. Hardwick, 478 U.S. at 196)). See also Barnes, 111 S. Ct. at 2467 (Scalia, J., concurring) (standards of morality satisfy rational basis test).

Respectfully submitted this 2nd day of April, 1993.

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sequently approve a mill levy increase to make up the lost revenue, the exemption of business personal property from taxation will shift the tax burden to those businesses that are not able to take advantage of such exemptions. Given the current structure of school finance, the resulting loss of school district property tax revenue will increase the burden on state resources.

AMENDMENT 2 — CONSTITUTIONAL AMENDMENT INITIATED BY PETITION

No Protected Status

Ballot Title: *An amendment to Article II of the Colorado Constitution to prohibit the state of Colorado and any of its political subdivisions from adopting or enforcing any law or policy which provides that homosexual, lesbian, or bisexual orientation, conduct, or relationships constitutes or entitles a person to claim any minority or protected status, quota preferences, or discrimination.* *

Provisions of the Proposed Constitutional Amendment

The proposed amendment to the Colorado Constitution would:

— prohibit the state, its branches or departments, or any of its agencies, political subdivisions, municipalities, and school districts from adopting or enforcing any law or policy that entitles any person to claim discrimination, protected status, minority status, or quota preferences based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships; and

— make all existing anti-discrimination ordinances, laws, regulations, and policies prohibiting discrimination based on an individual's homosexual, lesbian, or bisexual orientation unenforceable and unconstitutional.

Definitions

For the purposes of this analysis, the following terms have the given meanings:

— **"Civil rights laws"** refers to local, state, and federal laws designed to protect classes of persons from discrimination in areas such as employment, housing, and public accommodations.

— **"Constitutional rights"** refers to the guarantees contained in the federal Bill of Rights (first ten amendments to the United States Constitution) and made applicable to the states through the Fourteenth Amendment.

— **"Discrimination"** as commonly used in civil rights law, means any act which denies, prevents, or limits any person from obtaining or maintaining employment, housing, or public accommodations based on race, age, gender, disability, nationality, or religion. Some states and localities have extended similar protections against discrimination based on factors such as marital or familial status, military status, sexual orientation, or political affiliation.

— **"Equal protection"** refers to the clause in the Fourteenth Amendment to the United States Constitution which prohibits any state from adopting any law which denies the equal protection of the laws guaranteed to the citizens of the United States.

— **"Political subdivision"** generally refers to a county, municipality, school district, local junior college district, special district, water conservation district, cooperative agency, regional commission, or an Indian tribe organized pursuant to the federal "Indian Reorganization Act of 1934," as amended.

— **"Protected status"** means that a group has been identified for protection from actions which affect a protected or suspect class and which are limited or scrutinized as required by anti-discrimination statutes, ordinances, or common law.

— **"Quota"** refers to a remedy which imposes numerical goals to correct past discriminatory employment practices.

— **"Sexual orientation"** means the status of an individual as to his or her sexuality, for example, heterosexuality, homosexuality, lesbianism, or bisexuality.

Background

The proposed amendment arises in the context of three decades of increased governmental activity in the area of civil rights. The concepts of the federal Civil Rights Act of 1964 have been extended by Congress, the states, and local governments which have enacted new laws and strengthened existing laws to prohibit discrimination in employment, housing, access to public accommodations, and other areas involving civil rights. Courts at all levels are involved in interpreting and applying these laws, and administrative agencies have been created to enforce some of them. The proposed amendment identifies one area — discrimination based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships — in which civil rights laws and policies could **not** be enacted or enforced by the state government or by local governments in Colorado.

Evidence of discrimination. There is disagreement concerning the extent of discrimination against homosexuals, lesbians, and bisexual persons. Discussions with public agencies which maintain records on such discrimination complaints reveal that these individuals have been found to experience discrimination in access to employment, housing, military service, commercial space, public accommodations, health care, and educational facilities on college campuses. For example, of the 50 complaints reported to the Denver Agency for Human Rights and Community Relations in 1991, twenty-three were incidents of discrimination based on sexual orientation. Approximately 61 percent of these reports dealt with employment discrimination. Since 1988, the Boulder Office of Human Rights has investigated ten incidents of discrimination based on sexual orientation. Four of the

complaints lacked sufficient evidence to be considered discrimination based on sexual orientation. It is generally recognized that discrimination complaints often go unreported because individuals fear the repercussions and further victimization associated with disclosure of their sexual orientation.

Current Laws and Policies

Presently, a patchwork of federal, state, and local laws, regulations, and policies are in effect which monitor, offer limited protection against, or prohibit discrimination based on sexual orientation.

Local ordinances. Three home rule cities – Aspen, Boulder, and Denver – have ordinances protecting individuals from job, housing, and public accommodations discrimination when that discrimination is based solely on sexual orientation. None of the ordinances requires quotas, affirmative action, minority status or requires that employers or landlords seek out homosexual, lesbian, or bisexual employees or tenants. These cities have determined that discrimination based on sexual orientation was a sufficient problem to warrant protections against discrimination in the areas of employment, housing, and public accommodations.

Aspen's ordinance prohibits discrimination in the areas of employment, housing, and public accommodations because of race, creed, color, religion, ancestry, national origin, sex, age, marital or familial status, physical handicap, sexual orientation, or political affiliation. The Aspen ordinance does not exempt religious institutions. In Boulder, religious institutions cannot refuse to hire an individual or restrict access to public accommodations or housing because of that person's race, creed, color, gender, sexual orientation, marital or familial status, pregnancy, national origin, ancestry, age, or mental or physical disability. The Denver ordinance entirely exempts religious institutions, thus allowing them to refuse to hire persons or restrict access to public accommodations or housing based on a person's sexual orientation.

In Boulder, the owner of an owner-occupied, one-family dwelling or duplex is not permitted to deny housing to an individual based on his or her sexual orientation. However, the ordinance does allow owners to limit renters or lessees to persons of the same sex. In Denver, owners with rental spaces in their homes or duplexes (in which they reside) are exempted from the ordinance.

The anti-discrimination laws in these three cities do not classify homosexual, lesbian, or bisexual persons as ethnic minorities, but instead outlaw discrimination based on sexual orientation. These laws banning discrimination based on sexual orientation also prohibit discrimination against heterosexual individuals as well as against homosexual, lesbian, and bisexual persons. Attempts to pass similar anti-discrimination ordinances based on sexual orientation were defeated in Colorado Springs and Fort Collins. In addition, Denver Public Schools has adopted a nondiscrimination policy prohibiting discrimination based on sexual orientation.

State laws and policies. In 1990, the Governor issued an executive order prohibiting discrimination based on sexual orientation in the hiring, promotion, and firing of classified and exempt state employees. The order applies to executive departments and to state institutions of higher education. Metropolitan State College of Denver has a policy prohibiting college sponsored social clubs from discriminating in membership on the basis of sexual orientation. Colorado State University has a general nondiscrimination policy prohibiting discrimination based on sexual orientation. Conversely, the University of Colorado Board of Regents defeated a resolution prohibiting discriminatory practices based upon sexual orientation. The only Colorado statute offering protection based on sexual orientation prohibits health insurance companies from determining insurability based on an individual's sexual orientation. Legislation was defeated in 1991 which would have expanded Colorado's ethnic intimidation law to include the right of every person, regardless of age, handicapping condition or disability, or sexual orientation, to be protected from harassment. Recently, the Colorado Civil Rights Commission voted to recommend that the state's civil rights law be amended to prohibit discrimination based on sexual orientation.

Federal laws. There are no federal civil rights laws that protect persons from discrimination based on sexual orientation in the areas of housing, employment, or public accommodations. However, the federal Hate Crime Statistics Act of 1990 requires the United States Attorney General to monitor, in addition to other crimes, those crimes that manifest evidence of prejudice based on sexual orientation.

Laws and policies in other states, municipalities, and higher education institutions. Anti-discrimination laws and policies based on sexual orientation are not unique to Colorado. Six states (Connecticut, Hawaii, Massachusetts, New Jersey, Vermont, Wisconsin) and the District of Columbia, and approximately 110 cities and counties in 25 states have passed legislation protecting homosexual, lesbian, and bisexual persons from discrimination based on sexual orientation in employment, housing, and public accommodations. In contrast, the voters in Oregon will be considering an initiated measure, which among other provisions, would outlaw legislation aimed at protecting homosexual, lesbian, and bisexual persons from discrimination based on sexual orientation. In 1988, the voters in Oregon overturned an executive order that would have protected homosexual individuals from discrimination in state government.

Governors of eight states besides Colorado (California, Minnesota, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, and Washington) have issued executive orders prohibiting discrimination in state employment based on sexual orientation. Nationally, around 65 college and university systems have issued non-discrimination statements protecting heterosexual, homosexual, lesbian, and bisexual persons.

Impact of the Proposal

Passage of the amendment would make unenforceable and unconstitutional those ordinances which prohibit discrimination based on sexual orientation with regard to homosexual, lesbian, and bisexual persons. Therefore,

the portion of those ordinances prohibiting discrimination based on sexual orientation adopted by the city council or approved by the voters in the cities of Aspen, Boulder, and Denver would be rendered invalid. In addition, the amendment would nullify existing anti-discrimination policies based on sexual orientation which have been adopted by any state branch of government, department, agency, or school district in Colorado and would prevent adoption of any state statute, local ordinance, or policy for public entities which prohibits discrimination based on sexual orientation. The amendment would not affect the anti-discrimination policies based on sexual orientation that have been adopted by numerous private employers. However, the amendment does not address the rights of heterosexual individuals to bring claims of discrimination under existing or future ordinances, therefore the impact of the amendment on the rights of heterosexuals is not known.

Arguments For

1) There is no evidence that homosexual, lesbian, and bisexual individuals are sufficiently disadvantaged to warrant designation as a protected class. Protected class status is not a basic right guaranteed to all citizens by the United States Constitution. In general, protected class status has been afforded to groups which have historically been subjected to purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process, or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. Some groups which have been given protection are those identified because of national origin, culture, age, disability, gender, religion, and marital or familial status. Similarly, there are no organized, state-sanctioned legal barriers which deny their ability to participate in the political process as has been the situation faced by racial minorities, in particular. For these reasons, it appears that this amendment may pass constitutional muster.

2) Homosexual, lesbian, and bisexual persons do not require protected status because they are entitled to recourse under the tort laws for libelous or slanderous abuse, wrongful discharge, emotional distress, or similar theories. Since homosexual, lesbian, and bisexual persons cross all cultural lines they may already receive protections with regard to race, gender, age, ethnicity, disability, religion, or marital or familial status. Insufficient evidence exists for creating a legal cause of action by homosexual, lesbian, and bisexual individuals in employment, housing, and public accommodations to warrant adding sexual orientation as a protected class.

3) Granting protected status to homosexual, lesbian, and bisexual persons may compel some individuals to violate their private consciences or to face legal sanctions for failure to comply. For some individuals, homosexuality, or bisexuality conflicts with their religious values and teachings or their private moral values. If a landlord is required to rent an apartment, for example, to homosexual, lesbian, or bisexual persons, he or she may be asked to either condone a lifestyle of which they do not approve or to be in violation of a local ordinance. People and institutions should have the right to express and act upon their moral convictions without being accused of discrimination.

4) The amendment does not have a negative impact on home rule autonomy of Colorado cities nor does it intrude into traditional powers of local government. The Colorado Constitution guarantees local municipalities the ability to function legislatively only in municipal affairs. Civil rights issues are not normally considered by local governments. Because of the importance of these issues, a wider spectrum of individuals than just municipalities should consider these matters. Consideration of individual and group civil rights on the municipal level sets an improper precedent and only serves to dilute the original purpose of legislation enacting civil rights protections.

5) A proliferation of local ordinances or the possibility of a state statute that would provide protected status for homosexual, lesbian, and bisexual persons may divert resources for current enforcement activities. Additional discrimination cases may produce a demand for more staff and other state and local resources to investigate complaints, resolve disputes, or litigate cases.

Arguments Against

1) All individuals should be accorded the same basic dignity, right to privacy, privileges, and protections guaranteed to every citizen. Discrimination against any class of individuals is wrong and, if tolerated, can easily spread to any and all groups in our society. In a pluralistic society, a threat to the rights of any one group should be viewed as a threat to the rights of all citizens. The amendment deprives homosexual, lesbian, and bisexual persons of legal protection against discrimination based on sexual orientation by isolating them as a class which could not be protected by such civil rights laws. Civil rights laws are constantly evolving to meet the demands of society, and no group of people should be precluded from seeking civil rights protection or protection from discrimination. Civil rights laws prohibiting discrimination against homosexual, lesbian, and bisexual persons do not condone or encourage homosexuality or bisexuality; rather, they only condemn discrimination of any nature and ensure equal opportunity for every citizen. By eliminating legal protections, the amendment sanctions prejudicial acts against homosexual, lesbian, and bisexual persons.

2) Because homosexual, lesbian, and bisexual persons face discrimination in employment, housing, and public accommodations and are victims of hate crimes, civil rights laws are needed that prohibit discrimination based on sexual orientation. Without the ordinances, existing laws inadequately protect these individuals and fail to address discrimination in employment, housing, and public accommodations. Homosexual, lesbian, and bisexual individuals belong to all economic classes and are members of all racial, ethnic, disability, age, and religious communities. Because the kind of discrimination that these individuals experience is solely connected

to a person's sexual orientation, the added protection in the ordinances gives homosexual, lesbian, and bisexual individuals legal recourse should they be discriminated against on the basis of their sexual orientation.

3) The amendment attacks home rule autonomy and intrudes into the traditional powers of local governments and political subdivisions with respect to civil rights. Two-thirds of all Coloradans live in home rule cities. Under the Colorado Constitution home rule cities are empowered to address the needs of their residents as they see fit. This amendment also undermines county powers and the ability of the executive branch of government, school districts, and political subdivisions to enact their own anti-discrimination policies on this issue. The amendment implies that governmental entities, including the state, counties, cities, school districts, and other political subdivisions, should not be trusted to decide whether or not to protect persons from discrimination based on sexual orientation.

4) Ensuring the civil rights of any person, whether for age, gender, race, disability, religion, sexual orientation, marital or familial status, does no more than protect persons from discrimination and guarantee their basic human rights. The amendment is misleading and prejudicial by implying that homosexual, lesbian, and bisexual persons are seeking "minority status" or "quota preferences." Instead, the current local ordinances protect the right to get a job, buy a house, or have the same access to public accommodations as every other citizen. Each of these local ordinances also bans discrimination on the basis of age, gender, disability, religion, and marital or familial status, which are factors that are unrelated to whether a person is a member of a racial or ethnic group.

5) By singling out homosexual, lesbian, and bisexual persons in the state constitution and effectively denying them potential remedies for discrimination, the amendment denies them the same equal protections under the United States Constitution as other citizens. The proposed amendment may violate the equal protection clause of the United States Constitution, which prohibits any state from adopting a law which singles out a group for unfavorable or discriminatory treatment without a sufficient basis, or due to prejudice or irrational fears. For example, those city ordinances barring discrimination on the basis of sexual orientation could still be applicable to heterosexual individuals bringing claims of discrimination based on sexual orientation in housing, employment, and public accommodations, but not to homosexual, lesbian, and bisexual persons. Arbitrarily discriminating against any class of individuals in employment decisions based on sexual orientation is a violation of equal protection laws. Further, it is also a violation for a state to adopt a constitutional amendment which arbitrarily discriminates against homosexuals.

INTRODUCTORY COMMENTS – LIMITED GAMING
(Applicable to Amendments 3, 4, 5, and 9)

General Background

The Colorado Constitution, as adopted in 1876, prohibited gambling. Over the years, certain forms of gambling have been legalized by the General Assembly and the voters. These forms include pari-mutuel betting, games of chance (bingo and raffles), and lottery.

Limited Stakes Gambling in Colorado

Legalization of limited stakes gambling. In 1990, Colorado voters approved a constitutional amendment permitting limited stakes gaming in the commercial districts of Central City, Black Hawk, and Cripple Creek. "Limited gaming" is defined as the use of slot machines and the card games of blackjack and poker, each game having a single maximum bet of $5.00. In the 1990 amendment, limited gaming (hereinafter termed limited gambling) is restricted to buildings which conform to the architectural styles and designs common to the areas between 1875 and World War I. Limited gambling is further restricted in that no more than 35 percent of the square footage of any building and no more than 50 percent of any floor may be used for limited gambling purposes.

Most recently, the Ute Mountain Ute and the Southern Ute tribes of Colorado have obtained approval under federal law to operate casinos on reservation lands. The Ute Mountain Ute tribe has built a casino which may operate 24 hours a day. The casino will offer keno in addition to poker, blackjack, and slot machines, each with a maximum single bet of $5.00. The Ute Mountain Utes will pay no state gambling taxes because tribal sovereignty supersedes state law. The Southern Utes are currently in the process of establishing a casino.

Limited Gaming Control Commission. Limited stakes gambling is administered by the Limited Gaming Control Commission (Commission), which consists of five members appointed by the Governor and approved by a two-thirds majority of the Colorado Senate. Pursuant to the 1990 amendment, the Commission is responsible for administering gambling, creating rules and regulations, issuing licenses for gambling establishments, and determining the tax rate on gambling revenues.

Tax rate on gambling revenues. The constitutional amendment which legalizes limited gambling requires that a state tax of up to 40 percent of the adjusted gross proceeds of limited gambling (wagers minus payouts to players) be paid by each licensed gambling establishment for the privilege of conducting limited gambling. The constitution then authorizes the Commission to establish the tax percentage.

In August of 1991, the Commission established a graduated tax rate on adjusted gross proceeds (AGP) of limited gambling. The first $440,000 in AGP is taxed at 4 percent; the AGP between $440,000 and $1.2 million is taxed at 8 percent; and any amount over $1.2 million is taxed at 15 percent.

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